IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 25, 2007 Session

STATE OF TENNESSEE v. JERRY LEE HANNING

Appeal from the Criminal Court for Loudon County
No. 10914 E. Eugene Eblen, Judge

No. E2006-02196-CCA-R3-CD - Filed April 29, 2008

The defendant, Jerry Lee Hanning, pled guilty to driving under the influence after the trial court denied his motion to suppress. The defendant's plea agreement preserved a certified question of law regarding the legality of the police encounter which preceded his arrest. Upon consideration of the certified question, we hold that the trial court properly denied the motion to suppress. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Wade V. Davies and Kimberly A. Pride, Knoxville, Tennessee, for the appellant, Jerry Lee Hanning.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Russell Johnson, District Attorney General; and Frank A. Harvey, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the suppression hearing, Sergeant Kent Russell of the Loudon Police Department testified that he received a dispatch call about an anonymous report of a reckless driver on Interstate 75 North taking the exit ramp to Highway 72. He said the truck was identified as being black and having "1-800-GoSmith" or "Go Smith Brothers" on the back. He said that he was about 150 yards away in a McDonald's parking lot at the top of the exit ramp and that he went immediately to the location. He said he found a "semi-truck sitting on the emergency lane on the ramp." He said that he approached the truck from the front, having driven the wrong way down the exit ramp, and that he had his emergency lights flashing. He said that he went to the window and asked the defendant to get out of the truck and that his first question after that was "probably" whether the defendant had been drinking. He said he did not initially advise the defendant of his rights or tell him whether he was free to leave or required to stay. He said the defendant was not wearing shoes when he first got

out of the truck and that he went into the truck to retrieve the defendant's boots for him. He said he was unsure whether his emergency lights were still activated when he asked the defendant to get out of the truck but that "[t]hey should have been." He said he gave the defendant field sobriety tests, arrested the defendant, and took the defendant to the hospital for a blood test.

Sergeant Russell was shown a photograph of a truck during cross-examination. He admitted that the defendant's truck had appeared similar to the black truck with a symbol on the door depicted in the photograph, but he said he could not tell whether the truck in the photograph was the same one. He said the symbol on the door said "Smith Brothers" with "transport" underneath an "eagle-type" symbol. When asked to examine the symbol in the photograph, he said that it appeared to be the same.

The trial court denied the defendant's motion to suppress. The defendant then pled guilty and properly preserved a dispositive certified question of law. See Tenn. R. Crim. P. 37(b)(2); State v. Preston, 759 S.W.2d 647 (Tenn. 1988). The question is "whether the warrantless questioning and detention of Mr. Hanning violated the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Constitution of the State of Tennessee."

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is a question of law which we review de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The trial court's factual findings in this case are minimal. The court made no findings when it orally denied the motion. Its written order states, "Upon proof presented, the Court finds, based upon the defendant's vehicle being stationary on the shoulder of the Interstate off ramp at the time approached by Officer Russell, that said Motion is not well taken and is therefore **DENIED**." (Emphasis in original.)

The defendant argues that he was seized without reasonable suspicion or probable cause. The state argues that neither was required because Sergeant Russell was exercising his community caretaking function as an officer. The state argues that in any event, Sergeant Russell had reasonable suspicion to approach the defendant and make inquiry. Further, the state argues that the defendant waived his argument that he was seized when Sergeant Russell activated his blue lights because he did not argue this in the trial court.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "Article 1, Section 7 of the Tennessee Constitution is identical in intent and purpose with the Fourth Amendment." State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (citation omitted). In State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006), our supreme court

outlined the three types of encounters between the authorities and citizens and defined the applicable legal standard for each:

> Not all contact between police officers and citizens involves the seizure of a person under the Fourth Amendment of the United States Constitution or Article I, section 7 of the Tennessee Constitution. Courts have recognized three distinct types of police-citizen interactions: (1) a full scale arrest which must be supported by probable cause, see United States v. Watson, 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976); (2) a brief investigatory detention which must be supported by reasonable suspicion of criminal activity, see Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); and (3) a brief "consensual" police-citizen encounter which requires no objective justification, see Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). This last category includes community caretaking or public safety functions. See Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973); State v. Hawkins, 969 S.W.2d 936, 939 (Tenn. Crim. App. 1997).

We recognize that reasonable suspicion of criminal activity is not required for a police officer to approach a vehicle parked in a public place and request the driver's identification and registration documents. See, e.g., State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006); State v. Pulley, 863 S.W.2d 29, 29 (Tenn. 2003). However, a consensual citizen-police encounter is elevated to a seizure when the officer through physical force or show of authority restrains the citizen of his liberty. Williams, 185 S.W.3d at 316; see Terry v. Ohio, 392 U.S. 1, 19, n.16, 88 S. Ct. 1868, 1879, n.16 (1968). If the citizen would not, in view of the totality of the circumstances, feel free to leave, a seizure has occurred. Williams, 185 S.W.3d at 316, see United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980).

In determining whether Officer Russell's conduct amounted to a seizure, we consider "all the circumstances surrounding the encounter to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter." Id. at 425 (citing Florida v. Bostick, 501 U.S. 429, 440, 111 S. Ct. 2382, 2389 (1991)). If the police-citizen encounter constitutes a seizure, then, to be valid, the officer must have "a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been, or is about to be, committed." State v. Moore, 775 S.W.2d 372, 377 (Tenn. Crim. App. 1989) (citing Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1879-80 (1968)). In determining whether an officer's reasonable suspicion is supported by specific and articulable facts, "a court should consider the totality of the circumstances – the entire picture." Moore, 775 S.W.2d at 377 (citations omitted).

Our supreme court has said that a person who is in a parked vehicle is seized when a police officer exhibits a show of authority by activating his blue lights. Williams, 185 S.W.3d at 316-17; cf. State v. Gonzalez, 52 S.W.3d 90 (Tenn. Crim. App. 2000). "'Few, if any, reasonable citizens, while parked, would simply drive away and assume that the police, in turning on the emergency flashers, would be communicating something other than for them to remain.'" Id. (quoting Lawson v. State, 120 Md. App. 610, 707 A.2d 947, 951 (Md. Ct. Spec. App.1998).

That said, our supreme court has also recognized

> Not all use of the emergency blue lights on a patrol car will constitute a show of authority resulting in the seizure of a person. We realize that when officers act in their community caretaking function, they may want to activate their emergency equipment for their own safety and the safety of other motorists.

Id. at 318.

In the present case, according to Sergeant Russell's testimony, he was responding to a call about a reckless driver in a black truck with Smith Brothers insignia on the back. He was in a McDonald's parking lot that was at the top of the exit ramp where the anonymous caller had said the recklessly driven truck was exiting. He drove the wrong way down the exit ramp with his blue lights activated. He saw a truck parked in the emergency lane of the ramp, and he parked in front of it. He walked to the driver's door of the black truck, which was marked with the Smith Brothers insignia. He asked the defendant to step down from the cab of the truck and proceeded to question him.

Sergeant Russell's use of blue lights when driving down the exit ramp in the wrong direction was a proper exercise of his community caretaking function and was not directed, at least initially, at any particular individual. A reasonable person would believe the officer had activated his blue lights to alert oncoming traffic of his presence in the opposing flow of traffic and maintain his safety and that of the public in the situation. In the course of his travel, the officer saw a black truck sitting in the emergency lane that was positioned as if it had come off the interstate at the ramp. Given that he had been dispatched while sitting in a parking lot at the top of the exit ramp and had gone immediately to the ramp where he found a truck sitting as if it had exited the interstate, he had reasonable suspicion that the defendant's truck was the one the caller had identified as driving recklessly. His observations corroborated the information from the anonymous call. See State v. James Chester Cobb, Sr., No. 01C01-9011-CC-00308, Hickman County (Tenn. Crim. App. May 7, 1991) (holding that use of the Aguilar/Spinelli standard for issuance of search warrants, which focused on credibility of informant and reliability of information, was helpful in analyzing whether a police stop involving an anonymous tip was supported by reasonable suspicion); see generally Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584; Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964); State v. Jacumin, 778 S.W.2d 420 (Tenn. 1989) (adopting Aguilar/Spinelli test in Tennessee). He asked the defendant to step down from the elevated cab of the truck in order to

speak with him. An officer may, for safety reasons, ask a driver to get out of a vehicle to speak with him. State v. Berrios, 235 S.W.3d 99, 106 (Tenn. 2007) (citing Pennsylvania v. Mimms, 434 U.S. 106, 109-11, 98 S. Ct. 330, 332-33 (1977)). Based upon his reasonable suspicion that the defendant had been driving recklessly, he properly inquired about the defendant's alcohol consumption. From that interplay, he developed probable cause to arrest the defendant for driving under the influence.

The trial court properly denied the motion to suppress. In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE